S S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 1, 2014
v	No. 314175 Wexford Circuit Court
WOODROW ANTHONY BRAND, Defendant-Appellant.	LC No. 2012-010188-FH

Before: DONOFRIO, P.J., and SAAD and METER, JJ.

PER CURIAM.

Defendant appeals his jury convictions as a fourth habitual offender under MCL 769.12 of: (1) possession with intent to deliver less than 50 grams of a controlled substance (heroin), MCL 333.7401(2)(a)(*iv*); and (2) possession of less than 25 grams of a controlled substance (cocaine), MCL 333.7403(2)(a)(*v*). For the reasons stated below, we affirm.

I. BACKGROUND

On January 6, 2012, a Michigan State Police officer responded to a call about a suspicious individual in the city of Cadillac. The officer saw defendant coming from behind his patrol car from the southeast corner. Defendant explained that, earlier in the day, he had gotten a ride from his cousin's girlfriend, but after a disagreement, she apparently kicked him out of the car. Defendant stated that he had called some friends for a ride and then waited in the woods because he felt uncomfortable in the neighborhood. When he approached the officer, defendant was on the phone trying to give directions to his friend. After defendant's friend arrived and the two left, the officer decided to investigate what defendant had been doing in the woods. He located a single set of tracks in the snow in the same spot where he had observed defendant walking out of the woods. The trail extended about 75 feet and, at the end, the officer discovered a large Ziploc bag containing a white substance that was individually wrapped. Assuming the bag contained narcotics, he secured it in his car and then conducted a traffic stop on defendant's friends' vehicle.

The large bag contained five smaller bags. Laboratory testing indicated that one bag weighing 18.58 grams tested positive for heroin and another bag weighing 5.62 grams tested positive for cocaine. There were three additional bags of suspected cocaine that were not tested: one weighed a gram and the other two weighed a half gram each. Expert opinion testimony was presented that based on the quantity of heroin and its street value, defendant had intended to sell

the heroin, and it was highly unlikely that an individual would save that much heroin for personal use because heroin degrades over time. The expert also opined that the cocaine was packaged for resale and that it was likely defendant also intended to sell it.

Defendant was arrested and invoked his right to silence at the police post. However, he then made an unsolicited comment to the law-enforcement officers that "if you would have asked me, I was in the woods looking for that dope." At trial defendant admitted he made the statement, but claimed he was being sarcastic. Evidence was also presented that, while in jail awaiting trial, defendant told his cellmate that he planned to sell the cocaine and heroin, and that he had discarded the drugs before walking over to meet with the police officer.

II. CONSTITUTIONAL RIGHT TO SPEEDY TRIAL

Defendant unconvincingly argues that he was denied his constitutional right to a speedy trial because of a lengthy delay between his arrest and his trial, and that the charges against him should have been dismissed because of a violation of the statutory 180-day rule, MCL 780.131.

"The determination whether a defendant was denied a speedy trial is a mixed question of fact and law." *People v Waclawski*, 286 Mich App 634, 664; 780 NW2d 321 (2009). We review the trial court's factual findings for clear error. *Id*. However, review of a constitutional issue is a question of law which this Court reviews de novo. *Id*. "In addition, this Court must determine whether any error was harmless beyond a reasonable doubt." *Id*. Furthermore, legal issues presented under the 180-day rule, MCL 780.131, are subject to de novo review. *People v McLaughlin*, 258 Mich App 635, 643; 672 NW2d 860 (2003).

A criminal defendant is guaranteed the right to a speedy trial. US Const, Am VI; Const 1963, art 1, § 20. In determining whether a defendant has been denied a speedy trial, a court must weigh the conduct of the parties. *People v Williams*, 475 Mich 245, 261-262; 716 NW2d 208 (2006). Relevant factors include: "(1) the length of delay, (2) the reason for delay, (3) the defendant's assertion of the right, and (4) the prejudice to the defendant." *Id*.; *Vermont v Brillon*, 556 US 81; 129 S Ct 1283, 1290; 173 L Ed 2d 231 (2009). "The time for judging whether the right to a speedy trial has been violated runs from the date of the defendant's arrest." *Williams*, 475 Mich at 261. "When the delay is more than 18 months, prejudice is presumed, and the prosecution must show that no injury occurred." *People v Rivera*, 301 Mich App 188, 193; 835 NW2d 464 (2013). "When the delay is less than 18 months, the defendant must prove that he or she suffered prejudice." *Id*.

Here, defendant promptly asserted his right to a speedy trial, but the reason for the delay was attributable to both the prosecution and defense. The prosecution caused part of the delay by requesting an adjournment, and the defense caused part of the delay with two motions resulting in the substitution of defense counsel. One defense attorney withdrew because of a conflict of interest; another withdrew because defendant physically threatened him. Adjournments for substitution of counsel requested by defendant are attributed to defendant and do not weigh against the prosecution. *People v Cain*, 238 Mich App 95, 113; 605 NW2d 28 (1999). Defendant also contributed to the delay by filing a motion to quash charges, a motion in limine to prohibit the prosecution from introducing other acts evidence, and a motion to suppress defendant's statements. Time that the trial court spends adjudicating defense motions in limine

also weighs against the defense. *Id*. In this case, the trial court did not allocate a specific number of days attributable to the prosecution and days attributable to the defense; however, it is sufficient for our review to note that this factor does not weigh in favor of either the defense or the prosecution.

As for the length of the delay, defendant was arrested on January 6, 2012 and his trial commenced on November 6, 2012. Because the delay was less than 18 months, defendant must prove he suffered prejudice. *Id*. at 112. "[T]here are two types of prejudice, prejudice to the person and prejudice to the defense." *People v Wickham*, 200 Mich App 106, 112; 503 NW2d 701 (1993). Prejudice to the person occurs when there is "oppressive pretrial incarceration leading to anxiety and concern." *People v Collins*, 388 Mich 680, 694; 202 NW2d 769 (1972). Prejudice to the defense occurs, for example, when key witnesses may not be available as a result of the delay. *Id*. "Impairment of defense is the most serious, 'because the inability of a defendant to adequately prepare his case skews the fairness of the entire system.'" *Id*. (quoting *Barker v Wingo*, 407 US 514, 532; 92 S Ct 2182; 33 L Ed 2d 101 (1972)). Prejudice to the defense can also be affected by a witness's inability to accurately recall events of the distant past. *Barker*, 407 US at 532. However, general allegations that a witness's memory faded is insufficient to establish that a defendant was denied his right to a speedy trial. *People v Gilmore*, 222 Mich App 442, 462; 564 NW2d 158 (1997). On appeal and at trial, defendant asserted that there was prejudice to his person because: (1) he experienced anxiety and stress caused by incarceration, (2) his reputation has suffered because of his incarceration for the charges, and (3) he was having child custody complications because of his lengthy incarceration. However, "anxiety, alone, is insufficient to establish a violation of defendant's right to a speedy trial." *Id*. Moreover, defendant never specifically argued how his defense was prejudiced. He did not indicate that he had lost any evidence, that any witnesses were unavailable because of the delay, or that any specific witnesses' memories were negatively affected by the delay. He generally indicated that after nine months, memories were likely to continue to deteriorate, but because he offered only general statements, he has not shown he was denied a right to a speedy trial.[1]

III. OTHER ACTS EVIDENCE

Defendant brought a motion to exclude other acts testimony, but the trial court ruled that three other acts were admissible to prove defendant acted with a common plan or scheme. We review the trial court's decision to admit other acts evidence for an abuse of discretion. *Waclawski*, 286 Mich App at 670. An abuse of discretion occurs when the trial court chooses a result outside the range of reasonable and principled outcomes. *People v Orr*, 275 Mich App

[1] To the extent defendant claims a statutory right under MCL 780.131(1) in addition to his constitutional guarantee to speedy trial, we note that the statutory 180-day time period is inapplicable in this case. "The clear language of MCL 780.131(1) provides that [the Department of Corrections] must send written notice, by certified mail, *to the prosecutor* to trigger the 180–day requirement." *Rivera*, 301 Mich App at 192 (emphasis original). In this case it is undisputed that the Department of Corrections did not provide notice to the prosecuting attorney. Consequentially the 180-day rule does not apply.

587, 588-589; 739 NW2d 385 (2007). Generally, in order to be admissible under MRE 404(b), the other acts evidence: (1) must be offered for a proper purpose, (2) must be relevant, and (3) must not have its probative value substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004); see also *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000). Moreover, upon request the trial court may provide a limiting instruction under MRE 105. *Id*. A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994). "At its essence, MRE 404(b) is a rule of inclusion, allowing relevant other acts evidence as long as it is not being admitted solely to demonstrate criminal propensity." *People v Martzke*, 251 Mich App 282, 289; 651 NW2d 490 (2002).

The existence of a common plan or scheme is a "proper non-character purpose for presenting evidence of a defendant's other acts." *People v Pattison*, 276 Mich App 613, 616; 741 NW2d 558 (2007). Accordingly, the evidence was offered for a proper purpose in this case.

However, mechanical recitation of an enumerated reason, without more, is "insufficient to justify admission" of the other acts evidence. *People v Crawford*, 458 Mich 376, 387; 582 NW2d 785 (1998). The prosecution must instead explain how the other acts evidence is relevant. *People v McGhee*, 268 Mich App 600, 610; 709 NW2d 595 (2005). Evidence is relevant if is it material, i.e. is a fact of consequence to the action, and has probative force, i.e. a tendency to make the fact of consequence more or less probable. *Crawford*, 458 Mich at 389-390. Because the purposes listed in MRE 404(b) (1) are not intrinsically relevant, a trial court must closely scrutinize whether proposed other acts evidence is logically relevant to a proper, non-character purpose. *Crawford*, 458 Mich at 387-388. "[E]vidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." *People v Dobek*, 274 Mich App 58, 90; 732 NW2d 546 (2007) (quoting *Knox*, 469 at 510). However, a general similarity between the charged and uncharged acts is not, by itself, sufficient to establish that a common plan or scheme. *Id*. The prosecution bears the burden of establishing relevance. *Knox*, 469 Mich at 509.

Here, the evidence of defendant's other acts had a tendency to make it more probable that defendant would discard any illegal drugs when he saw a law-enforcement officer. In three prior incidents, he allegedly discarded illegal drugs when he believed he was going to be detained by the police. Admittedly there were differences between the other acts offenses and the charged offense. However, in all of the incidents defendant allegedly discarded the drugs after he saw the law-enforcement personnel, which is exactly what the prosecution contends occurred in this case. The evidence, therefore, appears to have more than a general similarity and was relevant to prove whether defendant had possessed and discarded the drugs.

Furthermore, the trial court did not abuse its discretion when it determined that the probative value of the other acts was not substantially outweighed by the danger of unfair prejudice. Evidence is considered unfairly prejudicial if it presents a danger that marginally probative evidence will be given undue or preemptive weight by the jury. *People v Feezel*, 486 Mich 184, 198; 783 NW2d 67 (2010). It is also unfairly prejudicial if it would be inequitable to allow the use of the evidence. *Waclawski*, 286 Mich App at 672. Here, the evidence was

probative, in light of the circumstances surrounding defendant's actions when he was approached by the police officer, and defendant has not shown that this evidence was unfairly prejudicial.

Also, the trial court provided a limiting instruction to the jury. Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Consequently, the trial court's instructions alleviated any danger of unfair prejudice and protected defendant's right to a fair trial.

In any event, any error was harmless, because there was substantial evidence supporting defendant's conviction. The arresting officer testified that he found the drugs at the end of a trail in the area where defendant came out of the woods. Then, at the police station, defendant indicated that if he had been asked he would have told the officers he was looking for the "dope." And defendant's cellmate testified that defendant said he initially planned to sell the drugs, but that he discarded them before speaking to the police officer. Accordingly, the jury likely would have convicted defendant regardless of the other acts evidence. MCR 2.613(A); *People v Lukity*, 460 Mich 484, 497; 596 NW2d 607 (1999).[2]

IV. PROSECUTORIAL MISCONDUCT

Defendant claims that the prosecutor committed misconduct by repeatedly presenting inadmissible evidence to the jury. Specifically, defendant asserts that: (1) the police officer's testimony that he found a glass pipe on defendant that contained a then-legal synthetic marijuana was irrelevant, inflammatory, hearsay, and constituted improper character evidence and opinion evidence; and (2) the police officer should not have testified that he believed defendant was attempting to avoid contact with law enforcement. Defendant also argues that this testimony violated his right to due process.

As an initial matter, we note that the testimony to which defendant objects was presented by defense counsel, not the prosecution. Defendant also failed to support his allegations that the evidence was inadmissible. Again, defendant's treatment of these issues is cursory, and he provides little to no citations to authority, and little to no analysis in support of his arguments. His claim of a due process violation is equally unsubstantiated. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his

[2] Defendant also asserts that his trial counsel was ineffective for failing to object to the other acts evidence. However, while defense counsel did not object to the testimony at trial, he moved to exclude the evidence in a proper pretrial motion, thereby fully presenting the issue to the trial court and preserving the issue for appellate review. Because the trial court had already conducted an evidentiary hearing, heard oral arguments, and received briefing on the issue, it is highly unlikely that the court would have altered its ruling at trial. Defense counsel is not ineffective for failing to raise a futile objection. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

claims, nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

V. USE OF DEFENDANT'S SILENCE AS SUBSTANTIVE EVIDENCE OF GUILT

Defendant also claims that the prosecution violated his constitutional right to remain silent by using his silence as evidence of guilt. Yet, the record reveals that defendant is incorrect. In fact, the prosecution simply pointed out the voluntary nature of defendant's admission about his knowledge of the drugs in the woods. Defendant made this damaging admission without any prompting by the police, and after he was read his *Miranda* rights and invoked his right to remain silent. This evidence properly served to rebut defendant's argument that his remark was simply sarcasm. Therefore, the prosecution did not violate defendant's right against self-incrimination.[3]

Affirmed.

/s/ Pat M. Donofrio
/s/ Henry William Saad
/s/ Patrick M. Meter

[3] Defendant's claims that his counsel was ineffective for failing to object to the prosecution's use of his silence and later statement is without merit, as the prosecution did not use the testimony as substantive evidence of defendant's guilt. As noted, defense counsel is not ineffective for failing to raise a futile objection. *Ericksen*, 288 Mich App at 201.